

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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DONALD B.,

Plaintiff,

v.

1:20-CV-1090  
(ML)

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

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APPEARANCES:

LEGAL AID SOCIETY OF MID-NEW YORK  
Counsel for the Plaintiff  
221 South Warren Street, Suite 310  
Syracuse, New York 13202

SOCIAL SECURITY ADMINISTRATION  
Counsel for the Defendant  
J.F.K. Federal Building, Room 625  
15 New Sudbury Street  
Boston, Massachusetts 02203

MIROSLAV LOVRIC, United States Magistrate Judge

OF COUNSEL:

ELIZABETH LOMBARDI, ESQ.

JESSICA RICHARDS, ESQ.  
Special Assistant U.S. Attorney

**ORDER**

Currently pending before the Court in this action, in which Plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), are cross-motions for judgment on the pleadings.<sup>1</sup> Oral

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<sup>1</sup> This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

argument was heard in connection with those motions on February 1, 2022, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination was supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by Plaintiff in this appeal.

After due deliberation, and based upon the Court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is

**ORDERED** as follows:

- 1) Plaintiff's motion for judgment on the pleadings (Dkt. No. 19) is DENIED.
- 2) Defendant's motion for judgment on the pleadings (Dkt. No. 25) is GRANTED.
- 3) The Commissioner's decision denying Plaintiff Social Security benefits is

AFFIRMED.

- 4) Plaintiff's Complaint (Dkt. No. 1) is DISMISSED.
- 5) The Clerk of Court is respectfully directed to enter judgment, based upon this

determination, DISMISSING Plaintiff's Complaint in its entirety and closing this case.

Dated: February 9, 2022  
Binghamton, New York



Miroslav Lovric  
United States Magistrate Judge  
Northern District of New York

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

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B.

VS.

20-CV-1090

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

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Transcript of an Order

Telephone conference

February 1, 2022

The HONORABLE MIROSLAV Lovric, Presiding.

A P P E A R A N C E S

For Plaintiff: ELIZABETH LOMBARDI, ESQ.

For Defendant: JESSICA RICHARDS , ESQ.

*Ruth I. Lynch, RPR, RMR, NYSRCR  
Official United States Court Reporter  
Binghamton, New York 13901*

1                   THE COURT: All right. Well, as I indicated  
2 at the commencement of the proceeding, the Court's  
3 intention is to render a decision and also the  
4 analysis and reasoning that the Court applied in  
5 reaching the decision in this matter.

6                   And as I indicated, the order of the Court  
7 will be transcribed and that transcript will be  
8 appended to the summary order. And so the parties  
9 will have that in writing. So if you miss something,  
10 don't worry, you will have this in writing to review.

11                  So let me begin by indicating that the  
12 Plaintiff has commenced this proceeding pursuant to  
13 42 USC Section 405(g) and 1383(c) to challenge the  
14 adverse determination by the Commissioner of Social  
15 Security finding that he was not disabled at the  
16 relevant times and therefore ineligible for the  
17 benefits that he sought.

18                  By way of background, I set forth the  
19 following facts.

20                  Plaintiff was born in the year 1965. The  
21 Court does not set forth the specific month and date  
22 in order to protect the privacy of Plaintiff. But  
23 Plaintiff was born in 1965 and therefore is currently  
24 approximately 56 years of age. He was 50 years old at  
25 the alleged onset of his disability on August 28th of

1 2016.

2 Plaintiff has been living with his ex-wife  
3 since December of 2018.

4 Plaintiff is 5 feet 7 inches in height and  
5 weighs approximately 165 pounds.

6 Plaintiff is a high school graduate and can  
7 communicate in English.

8 Plaintiff's past work experience was as a  
9 bartender and a waiter.

10 Plaintiff suffers from seizures, migraines,  
11 polyneuropathy, obesity, major depressive disorder,  
12 and alcohol and cannabis abuse. He also has acute  
13 kidney injury.

14 Plaintiff is prescribed Keppra for seizures  
15 and gabapentin for headaches.

16 Plaintiff testified that on days that he  
17 experiences a seizure he is unable to perform any  
18 chores. Plaintiff also testified that on days he is  
19 feeling okay he is able to do some household chores.

20 Plaintiff has not had a driver's license  
21 since the 1990s.

22 Procedurally the Court sets forth the  
23 following facts.

24 Plaintiff applied for Title II benefits on  
25 August 24th, 2017, alleging an onset date of

1       August 28th of 2016.

2                  In support of his claim for disability  
3 benefits, Plaintiff claims disability based on seizure  
4 disorder, migraine headaches, polyneuropathy, and  
5 obesity.

6                  Administrative Law Judge Brian LeCours  
7 conducted a hearing on April 24th of 2019 to address  
8 Plaintiff's application for benefits.

9                  ALJ LeCours issued an unfavorable decision  
10 on June 11th of 2019. That decision became a final  
11 determination of the agency, on March 10th, 2020, when  
12 the Social Security Administration Appeals Council  
13 denied Plaintiff's application for review.

14                 This action was commenced on September 14th,  
15 2020, and it is timely.

16                 In his decision, ALJ LeCours applied the  
17 familiar five-step test for determining disability.

18                 At step one he concluded that Plaintiff had  
19 not engaged in substantial gainful activity since  
20 August 28, 2016, through December 31st of 2020, which  
21 was the date on which Plaintiff was last insured.

22                 At step two the ALJ concluded that Plaintiff  
23 suffers from severe impairments that impose more than  
24 minimal limitations on his ability to perform basic  
25 work activities, specifically seizure disorder,

1 migraine headaches, polyneuropathy, obesity, major  
2 depressive disorder, and alcohol and cannabis abuse in  
3 early sustained remission.

4                   At step three ALJ LeCours concluded that  
5 Plaintiff's conditions do not meet or medically equal  
6 any of the listed presumptively disabling conditions  
7 set forth in the Commissioner's regulations, focusing  
8 on Listing 1.0, which relates to musculoskeletal  
9 system; Listing 11.0, which is neurological disorders;  
10 Listing 12.04, which relates to depressive, bipolar,  
11 and related disorders; and Listing 12.06, which  
12 relates to anxiety and obsessive compulsive disorder.

13                  The ALJ next determined that Plaintiff  
14 retains the residual functional capacity, also known  
15 as RFC, to perform less than the full range of medium  
16 work as defined in 20 CFR 404.1567(c). More  
17 specifically, the ALJ indicated he can lift and/or  
18 carry up to 50 pounds maximum, push and/or pull up to  
19 25 pounds frequently, and stand and/or walk for up to  
20 6 hours in an 8-hour workday. The ALJ noted he cannot  
21 climb ladders, ropes, or scaffolds and must avoid  
22 exposure to hazardous conditions, such as unprotected  
23 heights and dangerous machinery. He cannot do any  
24 commercial driving. Psychiatrically, he can only  
25 perform jobs that consist of unskilled tasks, work

1       requiring little to no judgment to do simple duties  
2       that can be learned on the job in a short period of  
3       time.

4                  At step four the ALJ concluded that  
5       Plaintiff could perform his past relevant work as a  
6       bartender and waiter. The ALJ still proceeded to  
7       step five, even though he made that conclusion at  
8       step four.

9                  At step five the ALJ concluded that in  
10      addition to his past work, Plaintiff could perform  
11      alternative work as a cleaner II, ALJ noting that  
12      there are over 20,000 jobs nationally; bartender  
13      helper, noting there are over 37,000 jobs nationally;  
14      dining room attendant, in that there are over 44,000  
15      jobs nationally; counter attendant, noting over 48,000  
16      jobs nationally; fast food worker, noting there are  
17      over 1.4 million jobs nationally; and fountain server,  
18      noting over 13,000 jobs nationally. The ALJ relied on  
19      hearing testimony from a vocational expert and also  
20      relied on the Dictionary of Occupational Titles, which  
21      is also referred to as DOT.

22                  Now, as you know, the Court's functional  
23      role in this case is limited and extremely  
24      deferential. I must determine whether correct legal  
25      principles were applied and whether the determination

1       is supported by substantial evidence, defined as such  
2       relevant evidence as a reasonable mind would find  
3       sufficient to support a conclusion. As the Second  
4       Circuit noted in *Brault v. Social Security*  
5       Administration Commissioner, found at 683 F.3d 443, a  
6       2012 Second Circuit case, therein the standard, the  
7       Second Circuit stated the standard is demanding, more  
8       so than the clearly erroneous standard. The Court  
9       noted in *Brault* that once there is a finding of fact,  
10      that fact can be rejected only if a reasonable fact  
11      finder would have to conclude otherwise.

12                  Now, Plaintiff raises several contentions on  
13      appeal before this Court.

14                  First, Plaintiff argues that the ALJ's RFC  
15      is not supported by substantial evidence because the  
16      ALJ failed to properly evaluate the Plaintiff's, A,  
17      headaches; B, seizures; and, C, mental impairments.

18                  Plaintiff also argues that the ALJ erred by  
19      failing to resolve or explain conflicts between the  
20      vocational expert's testimony and the DOT.

21                  The Court's analysis is as follows:

22                  First, I find that the ALJ properly  
23      accounted for limitations caused by Plaintiff's  
24      headaches. Contrary to Plaintiff's contention, the  
25      ALJ makes more than a single reference to Plaintiff's

1       headaches. For example, the ALJ discussed Plaintiff's  
2       health records that related to his headaches including  
3       examinations at Orange Blossom Family Health Center on  
4       August 1st, 2017, and September 5th of 2017; also  
5       references by Dr. Corak on August 21st, 2018 -- excuse  
6       me, that was August 21st of 2018; October 15 of 2018;  
7       and November 19 of 2018. ALJ also references, makes  
8       reference, to Dr. Timofeev on March 14, 2019, and by  
9       Dr. Ferraro on April 15th of 2019.

10                  In addition, the ALJ stated that he  
11       accommodated Plaintiff's subjective complaints into  
12       the RFC.

13                  Although Plaintiff argues that the ALJ did  
14       not consider whether his headaches would cause  
15       limitations in the RFC, Plaintiff bears the burden to  
16       provide evidence establishing the RFC limitations.  
17       See Poupore versus Astrue found at 566 F.3d 303 at  
18       page 306, a Second Circuit 2009 case.

19                  Based on the medical records dated in 2019  
20       from Dr. Timofeev and Ferraro, who opined that  
21       Plaintiff was normal and there were no changes to his  
22       medication, the Court can glean the rationale that  
23       Plaintiff's headaches would not have a meaningful  
24       impact on his ability to perform his past work.

25                  Second, I find that the ALJ properly

1 accounted for limitations caused by Plaintiff's  
2 seizures.

3                 While it is impermissible for an ALJ to  
4 interpret raw medical data and substitute his own  
5 opinion for that of a medical source, it is within the  
6 ALJ's power to resolve conflicts in the medical  
7 record. See *Hanson versus Commissioner of Social*  
8 *Security* at 15-CV-150, and that's found at 2016 West  
9 Law 3960486 at page 9, and that is a Northern District  
10 New York June 29, 2016 case.

11                 Here the ALJ properly resolved conflicts in  
12 Plaintiff's medical record and determined that  
13 Plaintiff's later treatment records show a significant  
14 reduction in frequency of seizures when he achieved  
15 sobriety and remained committed to taking his  
16 medication on a consistent basis. See transcript at  
17 page 36.

18                 The ALJ permissibly found Dr. Timofeev's  
19 opinion to not be persuasive because he did not  
20 actually test the claimant and render a full opinion.  
21 See transcript at page 30. In addition, the ALJ noted  
22 that Dr. Timofeev only examined Plaintiff on two  
23 occasions, in March and May of 2019, before rendering  
24 his opinion, which the ALJ stated was not long enough  
25 to fully ascertain Plaintiff's functional capabilities

1 or to determine whether he was capable of working.

2                   Third, I find that the ALJ properly  
3 accounted for limitations caused by Plaintiff's mental  
4 impairments. The ALJ properly considered that  
5 Plaintiff was treated for depression in 2019 but noted  
6 that later medical records reflected that he did not  
7 have any suicidal ideations and had significantly  
8 improved functioning. In addition, the ALJ noted that  
9 Plaintiff had a good rapport with providers, was  
10 pleasant and cooperative, had good interactions with  
11 nonmedical staff, and appeared comfortable during  
12 appointments despite poor family relationships. The  
13 RFC also limited Plaintiff to jobs that consisted of  
14 unskilled tasks requiring little or no judgment and  
15 simple duties that can be learned on the job in a  
16 short period. Further, Plaintiff -- further, I note  
17 that Plaintiff failed to state what the greater  
18 limitations were that supported Plaintiff's mental  
19 impairments.

20                   Fourth, I find that substantial evidence  
21 supports the ALJ's finding that Plaintiff could  
22 perform a significant number of jobs in the national  
23 economy.

24                   The parties agree that the ALJ erred when he  
25 had concluded that Plaintiff could perform his past

1 relevant work based on the RFC. However, this was  
2 harmless error because the ALJ in fact proceeded to  
3 step five of the evaluation and concluded that  
4 Plaintiff could perform other work in the national  
5 economy.

6 In addition, the parties agree that there is  
7 con -- that there is a conflict between the  
8 requirement for occasional climbing in the cleaner job  
9 and the limitation in Plaintiff's RFC to no climbing  
10 ladders, ramps, or scaffolds. As a result, this job  
11 is not considered as a representative occupation and  
12 should not have been considered by the ALJ. However,  
13 this finding was harmless because the ALJ identified  
14 five other jobs that Plaintiff could perform, and  
15 those five other jobs representing a total of  
16 1,545,722 positions nationally.

17 I find that there was no disagreement  
18 between the vocational expert's testimony and the DOT  
19 regarding commercial driving.

20 Plaintiff's citation to case of Robert G  
21 versus Saul at 19-CV-576, which is found at 2020 U.S.  
22 District LEXIS 138114, and that's a Northern District  
23 New York August 4th, 2020 case, the Court notes that  
24 Plaintiff's citation to that case is inapposite.  
25 There, the Court held that substantial evidence was

1 lacking to support the ALJ's finding that step five  
2 where the RFC included no more than incidental contact  
3 with the public and the DOT definitions of the jobs  
4 that the vocational expert testified the claimant  
5 could perform involved employee interaction with  
6 people that is not significant. There, the vocational  
7 expert's testimony did not provide any explanation to  
8 the ALJ regarding how the testimony conflicted with  
9 the DOT or a reasonable basis to support the  
10 testimony.

11               Whereas here the DOT does not discuss  
12 commercial driving. As a result, there was not, nor  
13 could there be, a conflict that the ALJ was required  
14 to resolve. The DOT and the vocational expert's  
15 testimony conflict where they disagreed in  
16 categorizing or describing a requirement of a job as  
17 it is performed in the national economy, but when the  
18 vocational expert's testimony concerns information  
19 outside the purview of the DOT, there is no conflict.  
20 See Jasinski versus Barnhart at 341 F.3d 182 at  
21 page 184, that's a Second Circuit 2003 case.

22               In addition, I find that there was no  
23 conflict between the DOT's listed requirements  
24 requiring environmental exposure or a fountain server  
25 and Plaintiff's RFC because the DOT states that the

1 fountain server job does not require exposure to  
2 moving mechanical parts or high exposed places.

3 As a result, I find Plaintiff's -- I  
4 conclude, I should say, Plaintiff's motion for  
5 judgment on the pleadings is denied. Defendant's  
6 motion for judgment on the pleadings is granted.  
7 Plaintiff's complaint is dismissed, and the  
8 Commissioner's decision denying Plaintiff benefits is  
9 affirmed.

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